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PRE-APPEAL BRIEF REQUEST FOR REVIEW

Docket Number (Optional)

033964-001060

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Application Number

10/783,085

Filed

02/20/2004

First Named Inventor

Kenneth David HARRIS, Jr. et al.

Art Unit

3671

Examiner

Tara L. Mayo

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

☐ applicant/inventor.☐ assignee of record of the entire interest.
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.
(Form PTO/SB/96)☒ attorney or agent of record. 43,143
Registration number _____☐ attorney or agent acting under 37 CFR 1.34.

Registration number if acting under 37 CFR 1.34 _____

Signature

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202-585-8000

Telephone number

October 31, 2006

Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.

☐ *Total of _____ forms are submitted.

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PRE-APPEAL BRIEF REQUEST FOR REVIEW ARGUMENTS

In the Office Action mailed May 31, 2006, and the Advisory Action mailed September 22, 2006, the Examiner has maintained her rejection of claims 1-31 under 35 U.S.C. 103 as being unpatentable over the cited prior art references. The Appellants contend that the Examiner has failed to properly establish a *prima facie* case of obviousness for the reasons set forth below, and request that this rejection be reversed.

Referring to the Office Action, claims 1-4, 6, 8-10, 12, 15-19, 21, 23-25, 27, 30, and 31 were rejected under 35 USC §103(a) as being unpatentable over U.S. Patent No. 3,273,174 to Cassini in view of U.S. Patent No. 5,895,365 to Tomlinson. Cassini discloses a bed rest pillow, as most clearly shown in the various figures. However, as conceded by the Examiner, the bed rest pillow disclosed in Cassini fails to disclose, teach, or otherwise suggest, two elongate armrests that are rotatably coupled to the backrest so that in the folded position, a longitudinal axes of the arms extend along the two side edges of the backrest as recited in independent claims 1, 16 and 31, and in the dependent claims dependent thereon. To cure the deficiencies of Cassini, the Examiner cites Tomlinson which discloses a messaging bed rest cushion where the armrests are rotatably coupled to the backrest. The Examiner asserts that it would have been obvious to one of ordinary skill in the art to modify the device shown in Cassini in view of Tomlinson to derive the present invention, and in particular, that it would be obvious to “substitute a detachable, rotatable coupler as taught by Tomlinson ‘365 for the attachment means shown by Cassini ‘174.” The Appellants respectfully disagree with this rejection, and request reversal of thereof.

Initially, it is noted that Cassini discloses a bed rest pillow wherein the armrests are removable. The armrests are secured to the backrest of the bed rest pillow via secured loops (5 and 6) that receive an end of the armrests therein. In contrast, Tomlinson discloses a messaging bed rest cushion with armrests that can be pivoted to be spread apart from each other, while maintaining perpendicular orientation relative to the back portion of the bed rest cushion. Therefore, there would absolutely be no motivation to combine these references in the manner now suggested by the Examiner, since one functions to immovably secure the armrest, while the other rod 38 disclosed in Tomlinson functions to movably secure the armrests.

Furthermore, it is also respectfully noted that these references still fail to disclose an axle that runs through a bottom portion of the backrest, as specifically recited in dependent claims 15 and 30. In contrast, Cassini does not have an axle at all, and the rod 38 disclosed in Tomlinson protrudes from the backrest, but does not run through a bottom portion of the backrest, as recited in these claims. In the Advisory Action, the Examiner states that this limitation is satisfied by the protruding coupler shown. This rejection is improper in that the protruding coupler is just that, a protrusion, and does not run through a bottom portion of the backrest. Correspondingly, for the reasons set forth above, the Appellants respectfully contend that the Examiner has failed to establish a proper *prima facie* case of obviousness, and request the reversal of this rejection as well.

Referring again to the Office Action, claims 5 and 20 were rejected under 35 USC § 103(a) as being unpatentable over Cassini and Tomlinson, discussed above, in further view of U.S. Patent No. 3,542,427 to Herpel et al. However, this rejection is believed to be rendered moot in view of the above comments, since claims 5 and 20 are ultimately dependent on independent claims 1 and 16, discussed above. Correspondingly, the withdrawal of this rejection, and the allowance of these claims are respectfully requested.

Referring again to the Office Action, claims 1, 7, 11-13, 15, 16, 22, 26-28, 30 and 31 were rejected under 35 USC §103(a) as being unpatentable over Cassini in view of Tomlinson, as discussed above, and in further view of U.S. Patent No. 6,682,494 to Sleichter, III et al. The Examiner relies upon Sleichter for disclosing vibratory and heating systems. However, Sleichter is directed to a slot, and not a bed rest pillow. Thus, this reference should not be relied upon. In addition, Sleichter fails to cure the deficiencies of the primary references, Cassini and Tomlinson, as discussed above. Correspondingly, this rejection is also believed to be improper as should be reversed as well.

Referring again to the Office Action, claims 14 and 29 were rejected under 35 USC § 103(a) as being unpatentable over Cassini in view of Tomlinson, discussed above, in further view of U.S. Patent No. 5,423,098 to Swezey et al. Again, this rejection is believed to be improper in view of the comments above, and in view of the fact that Swezey et al. fails to cure the deficiencies of the primary Cassini and Tomlinson references. Correspondingly, the reversal of this rejection is also requested.

Moreover, even if there was motivation to combine these references, such combination would result in a bed rest cushion wherein the armrests can be removed, and/or be spread apart, as taught by the combination of Cassini and Tomlinson, and would not result in a bed rest cushion that allows the armrests to be folded so that the longitudinal axes of the armrests extend along the side edges of the backrests as specifically recited in the rejected claims.

The Examiner states that the bed rest pillow disclosed in Cassini includes snaps that secure the armrest, and such snaps can be replaced with the rod 38 disclosed in Tomlinson, to derive the present invention as claimed. The Appellants respectfully disagree. In particular, as noted above, the snaps disclosed in the Cassini reference function to immovably secure the loops 5 and 6 that receive the armrests. As most clearly shown in Figure 6 of Cassini, because of the spaced positioning of the two snaps at the top and bottom of each of the loops, pivoting of the armrest disclosed in Cassini would not be possible, even if one or both of the snaps disclosed in Cassini are replaced by the rod disclosed in Tomlinson as suggested by the Examiner. In other words, because Cassini clearly discloses a pair of snaps, even if one or both of the snaps are replaced by the rod 38 disclosed in Tomlinson, such a combination would still fail to disclose armrests that can be rotated. Of course, such combination also fails to result in armrests that can be rotated so that the longitudinal axes of the armrests extend along the side edges of the backrest, as specifically recited in the claims. Correspondingly, even if these references are combined in the manner suggested by the Examiner (even though there is no suggestion or motivation to do so), they still fail to result in the foldable messaging backrest, as presently claimed. Thus, the Examiner has failed to properly establish a *prima facie* case of obviousness, and the reversal of this rejection is respectfully requested.

In the Advisory Action, the Examiner contends that one having ordinary skill in the art of couplers would know to place the rotatable couplers in a position to facilitate motion of the armrests in a desired direction. However, even if there was motivation to combine these references together in the manner suggested by the Examiner, there is no teachings in the cited references as to the specific placement of the rotatable couplers to allow the armrests to be moved in the recited manner of these claims. In this regard, the Examiner appears to be engaging in impermissible hindsight reconstruction based on the Appellants' own disclosure to determine the position of the rotatable couplers, and to reject the presently pending claims.